No. 15,820

United States Court of Appeals

For the Ninth Circuit

BOSTON INSURANCE COMPANY, a corporation,	*Appellant,*
vs.	
HYRUM JENSEN, individually and doing business as Eureka Lumber Company,	*Appellee.*

BRIEF FOR APPELLEE.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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STATEMENT OF THE CASE.

This is an action on a California Standard Form Fire Insurance Policy (Ex. 1). The defenses urged were arson and conspiracy to commit arson, and concealment of the said arson, and fraudulent misstatement of inventory together with wilful failure to produce records.

At approximately noon on June 25, 1956 a fire occurred inside the building of the Eureka Lumber Company, the named insured (383, 408, Ex. U, 532, 533, 240, 241, 242). The fire apparently had a single point of origin at the floor level of the first floor in the southwest room (431, 432, 400-402), and it spread upward and outward to other parts of the building (433-437).

The northerly floor area of the southwest room showed deep-seated charring indicating the fire had started there (431, 432, 445, and 448). Near the point of origin, the firemen found an empty, open-topped five gallon container with a diesel fluid odor, and a fifty gallon drum containing some gasoline with its pump affixed. The gasoline was still unconsumed by fire (254). Ordinarily such room was used to store merchandise, such as asphalt shingles and plywood (101). Diesel fuel, cleaning solvents and gasoline were ordinarily kept on the premises for the operation and cleaning of machinery (254). There was merchandise and oil there as part of the regular stock in trade usually kept there (443). There was the usual amount of grease that accompanies mechanical work (442). There was a portable sawmill powered by diesel engine located in the southeast quarter of the west one-half of the building. In an area adjacent to the north and west sides of the portable sawmill the firemen found two open topped one gallon containers and a partially burned rag, all with diesel odors in the debris (418-420, 413-439, 454, Exs. Z, AA, and AJ).

At the scene of the fire and before entering the building during the fire the appellee exclaimed to the firemen, "I didn't know, I think somebody set it afire, we had better get an investigator" (114). The "I didn't know" quotation had reference to a response to a question as to how the fire started.

At about 12:05 p.m. the bookkeeper, Ellen Van Harpin, left the building leaving H. D. Jensen in the building (495) and earlier, H. D. Jensen had been

in and she saw H. D. Jensen in the southwest room (495, 526-528). Shortly thereafter H. D. Jensen was seen to leave the building and approach a customer, had a conversation with him and the customer saw Jensen walk away toward Third Avenue and up Broadway to get lunch (396-397). Apparently upon reaching Third and Broadway the witness Musser, whose office is at that intersection observed Jensen start his car, come up to Musser's place of business, stop, peer in and begin to get out, then Jensen observing that Musser was on the telephone, closed the door and drove away up Broadway. Witness Musser said, "He opened the door like he was going to get out, about a foot, I would say. And I was on the telephone and he closed the door. He must have shoved the foot throttle down to the floorboard and took off." And further, "the rate of speed wasn't very great, but the tires was sure going round" (262).

In a proof of loss executed by appellee, he stated he had no knowledge of the origin of the fire, fixed the total inventory of stock at $63,549.54 and the loss at $33,549.59 of which $20,600.00 was claimed for the loss of 66,000 board feet of top grade redwood molding, 35,000 board feet of fence board (Ex. K., 248). Two electric motors listed in the inventory at $600 and $700 respectively were insured by Hill and Morton, Inc., by another insurance company with whom Hill and Morton, Inc. filed proof of loss and was paid under its policy (575, 186). Appellee knew nothing of any interest of Hill and Morton, Inc. or any claimed interest of Hill and Morton, Inc. and did not know that they claimed a fire loss (186-187).

The appellee had a good credit standing at the Crocker-Anglo Bank at the time of the fire (68, 70, 71). The appellee had made a net profit of approximately $20,000 in 1955 (568). The property involved in the fire was under-insured and shortly before the fire the appellee was asked by his insurance agent to increase the insurance because the agent felt that it was under-insured, but that appellee did not increase insurance (61, 62). The appellee had only $10,000 insurance on the building, whereas the purchase price and value thereof was approximately $35,000 (76, Ex. 3, 127). There was machinery that was not insured under any policy which was of a mobile nature and which was often kept outside the building on the open storage area which machinery was destroyed by the fire and had a value of several thousand dollars (125, 126).

The office of the appellee was invaded by the fire (109, Ex. 10). Smoke billowed out of the office windows at the outset of the fire (113).

Fireman McBeth and others reported fire having invaded the office area (380).

Such records as were available were made available to the insurance carrier upon every demand. No demand was made until October, 1956. The appellee then produced his records which were wet and strung out, all over the building, partially rotted. Prior thereto many insurance representatives at many times had made reference to the records and access to them had never been refused by the appellee (121, 122, 123, 124).

The appellee requested copies of supplier's invoices (136). The biggest part of the records after the fire were rotted and wet (206). The appellee turned over all the records that he could find and of which he had knowledge (207). The appellee submitted to an examination under oath in October of 1956 and at that time counsel for appellee requested the appellant to make known any specific requests for records and effort would be made to obtain same (209, 210).

No list of specific items required was ever furnished 569). The only request made was a blanket request under a letter of October 19, requesting that all invoices, all records, etc. be produced. No records were ever refused the appellant (564, 565). The witness Van Harpin testified that she came in and saw the records piled on the floor but she did not look them over, did not open any files, or did not inspect the records (491).

SUMMARY OF ARGUMENT.

1. There is no sufficient substantial evidence to support a finding of arson. Therefore the Court properly withdrew the issue from the jury and properly excluded evidence of motive, conspiracy, fraudulent concealment of arson and false claim based on arson until after the basic ingredient, arson, was proved. It is the contention of the appellee that a finding that arson was properly withdrawn from the jury and not proved would dispose of specifications of error, numbers 1, 2, 4, 8, and 11, since all those specifications de-

pend upon a prior proof of arson before they become material.

2. In regard to Specification 3, the evidence is that all information received by appellee was passed on to proper insurance company representatives.

3. In answer to Specification 5, evidence of a quantity of inventory at December 31, 1955 was too remote and the Court properly excluded evidence thereof as having no bearing on an inventory evaluation six months thereafter.

4. In regard to Specification 6, the knowledge of Dayton D. Murray, Jr., of a sale of the sawmill was gained from the two principals, the buyer and the seller, and therefore did not constitute hearsay. There is no better source for information regarding a sale that the direct statements of buyer and seller.

5. In regard to Specification 7, the invoice was properly admitted in evidence by copy inasmuch as it was demonstrated that the original had come into existence, had in the ordinary course of business been sent to the appellee and that the appellee had lost the same.

6. That the instructions as covered in Specifications Nos. 9, 10 and 11 were proper as given by the Court and are supported by the law of the State of California. As to the failure to instruct under Specification 11-A, it is the position of the appellee that the proper opportunity was given to appellant to take exception to failure to instruct by consultation with both counsel and the Court in Court's chambers and

that at that consultation it was agreed that there would be no basis upon which the Court could instruct as to the issue of fraud of an employee being imputable to the employer and that at the conclusion of the conference the Court indicated its intention not to instruct. Should appellant have desired to take an exception, he could have done so of record after the Court's announced intention not to instruct.

7. In answer to Specification 12, the instruction given properly covered the duties, burdens and obligations of the parties to the action under California law.

8. That in answer to Specification No. 13, the Court properly denied the motion for directed verdict and for new trial, having already ascertained and having reexamined and again ascertained that none of the defenses of the insurance company were established as a matter of law, and that the defense of arson was not proved sufficiently to be submitted to the jury.

ARGUMENT.

I.

Arson, or incendiary nature of the fire, has not been proved by any substantial evidence, and the Court properly excludes consideration of the issue by the jury.

When property burns, the law implies that the fire was the result of accident or some providential cause rather than of criminal design. (4 *Am. Jur.* on Arson,

§ 42, page 105, LRA 1916 D, page 1299, and cases there cited to the effect that the presumption that the burning was accidental *must be overcome* (emphasis supplied).

It is possible of course to establish corpus delicti of arson or incendiary fire by circumstantial evidence just as it is in any other crime. However, such proof must satisfy the usual requirements in that respect, that not only must the circumstances be consistent with guilt or the commission of the crime but in order to sustain a finding of arson, the evidence must also be inconsistent with any other rational hypothesis. *People v. Lepkojes,* 48 C.A. 654; *People v. Angelopoulos,* 30 C.A. 2d 538.

Many cases have considered the sufficiency of evidence to establish arson by circumstance and the cases cited by appellant in his opening brief on this point have been carefully read and analyzed. Appellee has no fear for the comparison of the circumstances in this case to those found to exist in the cases cited by appellant. In *People v. Maas,* 145 C.A. 2d 69, the defendant confessed and admitted his incendiary act and accordingly only very slight establishment of the corpus delicti was required for the admission of his confession. No such circumstance exists in this case before the Court. In *People v. Becker,* at 94 C.A. 2d 434, the prosecution established the means by which the fire was set, established over-insurance, established that valuable household furniture and art work were removed from the building immediately prior to the fire, that the furniture claimed to have

been lost in the fire was later found stored in an apartment which the defendant had rented under another name. None of those circumstances are present in the case before this Court.

In *People v. Kasparoff,* 94 C.A. 7, the fire there appeared obviously of incendiary origin, there was over-insurance and there was a murder circumstance present to connect the defendant to the crime. None of those circumstances are present in this case.

In *People v. Gilyard,* 134 C.A. 184, women's clothing soaked in kerosene were found underneath a residence and spots of kerosene were found upon the clothes of defendant. The defendants were living in an illicit relationship, there were wide divergences between the physical evidence of the whereabouts of the defendants and the alibi story presented by them. There was evidence of over-insurance. None of those circumstances exists in this case.

In *People v. Kessler,* 62 C.A. 2d 817, the defendant conceded that the fire was of incendiary origin (page 819) and the only question before the Court there was the connection of the defendant to the criminal act. The fact that the door was locked and the defendant had the only key was of importance to connect the defendant with the crime, but was not considered as establishing the criminal act itself. Here there is no incendiary fire proved and the mere fact that doors might be locked does not become of importance.

Likewise, in *People v. Freeman,* 135 C.A. 2d 11, the appellant-defendant there conceded that the fire was

of incendiary origin (page 11). That likewise then became merely a problem of connecting the defendant with a proved criminal act.

And finally, the last case cited by the appellant in this connection, *People v. Hays,* 101 C.A. 2d 305, there were four separate fires, that each occurred at a location where the plaster had been broken and the interior of the wall made available to the flame, that there was over-insurance, that the defendant was seen carrying a jug of solvent into the unoccupied premises just prior to the fire, that she made evasive statements such as, "She was no fool and knew that she did not have to answer unless she wanted to," upon interrogation by the District Attorney. Here we have none of those circumstances. There was only one point of origin for the fire, nor were there any contents of the building unusual to its ordinary use, and there was certainly no over-insurance.

Let us examine to see if the circumstances in this case compare in any manner with any case the appellant has cited.

The insurance agent, Goldblatt, attempted to have the insurance on the property increased less than a month prior to the fire because of the extensive remodeling and additions to value that had been placed upon the property by the insured (61). Such increase was not made. The total insurance carried on the stock was $20,000 which is the policy here in issue, and $10,000 on the building, or a total of $30,000. The purchase price paid by the appellee for the property

as revealed in the unpaid purchase money note to Anna Hess (76, Ex. 3) and the evaluation placed thereon by the insured which stands uncontradicted (127) and the remodeling added thereto afterwards indicate that the value of the building alone was in excess of the total insurance carried for both stock and building.

The fire occurred at lunch time, and it was customary for the place to be locked up during the lunch period as a matter of general practice (113, 245). The fact that the building was locked would be a normal, usual circumstance, rather than an unusual one.

When asked at the scene of the fire as to the cause thereof, appellee responded that he didn't know, he thought it was set and that an investigator should be called in (114). This is an exclamation made at the time of the fire and certainly the request that an investigator be put on the case is not the act of a person with a guilty conscience. Likewise, the statement made by appellee as per his testimony at 114 is not an outright statement of knowledge of just what took place, but is obviously an extemporaneous guess.

There was much uninsured equipment in the building at the time of the fire which could very easily and without suspicion have been removed. This consisted in main of mobile equipment used chiefly outside the building in the open lumber storage area of appellee together with other easily movable and uninsured items (125, 126). This uninsured equipment had a value of several thousand dollars.

The presence of diesel fuel, cleaning rags and gasoline in and about the premises is fully explained (254). Even the expert called by the appellant saw nothing unusual in the presence of inflammables at the scene of the origin of the fire (442). It is to be noted that the gasoline was still in the drum after the fire and according to the testimony of Expert McBeth, it was at the hottest part of the fire in the southwest room (254, 440).

The arson investigator, McBeth, testified fully as to the investigative procedure followed by him and stated at page 431 that he caused fragments at the point of origin of the fire to be sent to a laboratory in Sacramento, California for examination for additives or evidence of arson. Nowhere does the witness McBeth indicate that such examination resulted in positive findings. Had such findings been positive, it can be presumed that the appellant would have brought such information out. The appellant was in possession of the report or at least the appellant's witness was, and it can be presumed that the reason it was not pursued further was that the findings were negative. Reference was made to finding of fuel containers in the northeast or "Kaiser" room, but that there was no burning in this room at all (434). Reference was made to diesel can with cleaning rags therein found in the area adjacent to the sawmill, but the evidence of both McBeth (438) and the witness Jensen (not related to the appellee) indicates that there was no fire originating in that area (400).

The arson expert McBeth found nothing unusual in the grease or fuel conditions (442) and that all the inflammables appeared to be stock-in-trade items (443) and after his extensive investigation and testimony regarding the results thereof flatly states that he has no opinion as to what caused the fire (443). This is the appellant's own witness speaking. Certainly if the expert who testified from personal knowledge of having been present at the fighting of the fire and having made personal observation based upon expert knowledge and experience cannot form any opinion regarding the origin of the fire, then to ask the jury to do so would be dealing in pure conjecture and speculation. There was nothing by way of evidence offered by any of the other witnesses produced that would add anything to the testimony of the witness McBeth in this regard, and the Court properly concluded that the expert produced by the defendant was correct, that there was nothing upon which to base an opinion that the fire was of incendiary origin.

Boiled down, the only evidence in this case is that a fire occurred which had a single point of origin in an area where inflammables were usually and normally kept and that the inflammables which were open burned, and those which were closed did not. There was no evidence of any agency which might have caused the fire and while such agency does not have to be proved with exactitude, it seems but reasonable to require the appellants to at least produce some theory as to the manner in which the fire started. This they have not done.

Appellants attempt to establish the basic ingredient of arson by evidence which might be used to connect H. D. Jensen to the crime after it had been proved to have been committed. Such evidence consists of the opportunity of Mr. Jensen (not the appellee but his son) to have set the fire. H. D. Jensen's testimony is that he performed his regular work that morning which required his presence from 8 a.m. to 12 noon. The mere fact that he was there certainly is not an unusual circumstance. It would be more unusual if he were not performing his usual duties. H. D. Jensen, shortly before the fire, talked with a customer and then *walked* away toward Third and Broadway (396, 397). It is to be noted that he did not *fly* away as appellant would like us to believe.

Apparently H. D. Jensen walked from the customer to whatever location his vehicle was parked in, and drove south along Broadway to the intersection of Third and Broadway where he stopped at the place of business of the witness Musser and began to alight, when he observed that Musser was busy on the telephone, reclosed his door and drove off. Although Musser states that H. D. Jensen put the throttle to the floorboard, in the next sentence he is unable to describe the vehicle's speed as fast (262 and 261). However the witness Musser saw no fire or smoke until after he had seen H. D. Jensen leave (264).

In all reasonableness and fairness, it cannot be said that the behavior of H. D. Jensen in leaving the offices and coming over and carrying on a leisurely conversation with a customer on the lot of the appellee,

then walking to his parked vehicle, driving away, then stopping at Musser's and starting again is a description of wild flight from the scene of a crime. Why would H. D. Jensen have stopped to engage in conversation with the customer—why would he walk rather than run to his car—why would he stop in front of Musser's place of business if he were in wild flight? There is certainly nothing in the testimony of the customer to indicate any state of nervousness or agitation or indeed any unusual behavior of any description (Testimony of the customer as recorded at 396 and 397).

A comparison of the circumstances present in this case is invited to those present in the *People v. Angelopoulos,* 30 C.A. 2d 538, wherein the Court found as a matter of law that there was insufficient evidence to even connect the defendants with the incendiary fire. It should be kept in mind that in the *Angelopoulos* case it was conceded and admitted that the fire was of incendiary origin and the Court there held that the many circumstances proved merely were sufficient to arouse some suspicion but certainly not sufficient to support a finding against the defendants.

In *People v. Jenkins,* 67 C.A. 631, the Court considered the circumstances in that case and found them insufficient even to support the *slight* showing of corpus delicti necessary to permit the introduction of a confession.

Likewise, in *People v. Bispham,* 26 C.A. 2d 216, the Court once again considered the slight showing of

corpus delicti necessary to precede admitting a confession and found the circumstances inadequate as a matter of law and reiterated the well established doctrine that the weighing of the sufficiency of the evidence in a matter of this sort is primarily one for the trial Court in its wise discretion.

Finally, in *People v. Seltzer,* 107 C.A. 2d 627, the Court considered the circumstances that the property was over-insured, that the defendant had upon leaving the store prior to the fire taken the day's cash receipts with him instead of leaving them in a safe as was his usual practice, that the defendant had cleared the store of employees by making special request that they close promptly and offering to drive the employees home, that the burglar alarm which would have given some prior notice of the fire was left open, whereas the defendant had said that he closed the same, that the fire was obviously of incendiary origin and the arson expert called so testified, that after clearing the store of employees the defendant again reentered and his actions for a few minutes thereafter were unaccounted for, that fifteen minutes or so later the fire was discovered, and after considering the above circumstances, the Court asked itself the question, "Was there substantial evidence to sustain the verdict of guilty and the judgment predicated thereon?" and answers the question, "No." Certainly if there were insufficient circumstances in the *People v. Seltzer,* there is no question as to the insufficiency of the evidence to establish arson in the case at bar, and the Court properly refused to submit the issue to the jury.

While this is not a criminal proceeding, most of the argument and discussion has related itself to the description of arson as a crime, because after all, that is what it is. And inasmuch as it is a crime, it is a serious offense and should not lightly be charged in the absence of evidence as a coloring matter in the presentation of an insurance loss case. To have permitted it to go to the jury on the basis of the evidence introduced would have been prejudicial to the appellee and reversibly erroneous.

Disposition of the defense of arson, likewise disposes of the specification No. 2, regarding evidence of motive. It is so well established that evidence of motive is not admissible until the corpus delicti has been established that it does not require the citation of authorities. The question of motive not being material under the proof offered, evidence thereof was properly excluded. Many pages are taken up by questions asked by appellant's counsel which were properly objectionable and many pages of the Appellant's Opening Brief were taken up in evidence which he might have introduced, obviously as coloring matter again in the consideration of this case. Appellee did not belabor the Court below unduly, nor will it belabor this Court as to the evidence it would have introduced in rebuttal of any attempt on the part of appellant to show a poor financial condition here inasmuch as it is immaterial to any issue presented.

Likewise, the Specification No. 4 has to do with the conspiracy alleged to set fire and of course it is likewise immaterial until the setting of the fire or at least

an attempt thereto has been shown. It falls in the same category as motive. Until the criminal act or an overt act towards the commission of a criminal act is shown, then evidence of a conspiracy to commit the same is immaterial. *Code of Civil Procedure,* State of California, § 1870, subsection 6, 11 *Cal. Jur.* 2d on Conspiracy, § 32, page 257. The trial Court should require the proof of a conspiracy before permitting any evidence which would merely show acts done pursuant to the conspiracy.

The appellant having failed to prove a conspiracy or any overt act toward the setting of a fire was certainly not in a position to insist that he be permitted to cross-examine further on a question to which he had already received a rather emphatic answer. It would also appear that whether or not H. D. Jensen appeared for an examination under oath is somewhat irrelevant to the existence or lack of existence of a conspiracy. H. D. Jensen is not a plaintiff in this action against the insurance company and makes no claim under the policy, and under the policy provisions has no duty to appear for sworn examination. The policy by its terms (Ex. 1) requires *only* the insured to appear. Nowhere in the records does it indicate by any evidence that H. D. Jensen was an insured. It would appear that his failure to submit to a sworn examination was a matter of discretion with him and that he was under no duty to appear.

Likewise, Specification 8, has to do with an attempt to prove a joinder of interests between appellee and H. D. Jensen and would have relevance or materiality

only after a conspiracy were proved and an overt act of arson established. The basic ground upon which the Court sustained the objection to the document involved in the said specification was that, being a 1953 transaction, it was too remote to a 1956 fire. Whether or not such offered evidence is too remote to bear upon the issue is a matter of discretion for the trial Court to determine and will not be disturbed except upon a showing of abuse. *People v. MacArthur,* 125 C.A. 2d 212, at page 219; *Schomaker v. Provoo,* 98 C.A. 2d 738 at page 740; *Spolter v. Four Wheel Brake Service Co.,* 99 C.A. 2d 690 at page 699; Section 1868, *Code of Civil Procedure,* State of California.

Likewise, Specification 11 stands or falls upon the establishment of arson inasmuch as there is no basis for submitting the issue called for in the instruction set out in that specification if the issue of arson and the origin of the fire has already been determined favorably to the plaintiff. The basis of the instruction there proposed is that the appellee knew of the origin of the fire having set it, or conspired to set it, and since there was no proof offered upon which that issue could be submitted to the jury, the instruction was properly refused.

II.

The point raised in Specification 3 appears to be of trivial importance here. The appellee testified at pages 114 through 116 regarding receiving information concerning the fire and passing the same on to the proper authorities. There is nothing hearsay in the

revelation of this *act* of passing on the information to the proper authorities. There is no doubt but what the appellee would have been permitted to testify as to what he did with any information coming to his possession and the sum and substance of the testimony set out in this specification amounts to simply that. This point I perceive does not require further elaboration.

III.

In Specification 5 complaint is once again made upon a finding of the trial Court that an inventory figure some six months prior in time to the evaluation date involved in this case was to remote to bear upon the inventory present at the time of the fire. Once again the trial Court has the discretion to so determine, and his discretion is supported by the authorities heretofore cited under the discussion on Specification 8. In addition, as to the question of value at a given date, *Meyer v. Parsons,* 129 C. 653, holds that the value of stock of merchandise at any time other than the evaluation date is entirely irrelevant. In *Mayers v. Alexander,* 73 C.A. 2d 752, the Court holds as page 762 that evidence of value one year prior to the evaluation date was too remote. There is no showing here that the Court abused its discretion in excluding a book inventory figure some six months prior to the fire. Other evidence, including actual physical inventory at and after the fire was offered and in the face of such better evidence the Court was entirely justified in holding that other more remote evidence would not bear properly upon the issue of valuation as at the date of fire.

IV.

In Specification 6, exception is taken to the allowing of Dayton D. Murray, Jr. to testify as to his knowledge of a transaction wherein appellee sold a sawmill, destroyed in the fire, to Dayton Murray Truck Sales for $7,500. The basis for the exception is that it is suggested that Mr. Murray the witness had no knowledge of the transaction. At page 336, Mr. Murray states, "I have no direct knowledge of the transaction. I have knowledge of it from discussions with Mr. Harold D. Jensen and with Mr. Threlkeld who is the previous manager of Dayton Murray Truck Sales." He further goes on to say that those discussions were in the course of conduct of the business of Dayton Murray Truck Sales. When it is kept in mind that the identity of the parties with whom the discussions were had were the manager of the buyer and the manager of the seller, they become the primary sources of knowledge concerning a transaction and are not hearsay. What better source for information as to the facts of a transaction can be obtained than the buyer and the seller?

Further the witness Murray stated on page 337 that his knowledge of the transaction was not only from discussions with the buyer and seller but from the documents recording the transaction as kept by Dayton Murray Truck Sales. Mr. Murray had previously testified that he had the documents recording this sale in his custody in his official capacity with Dayton Murray Truck Sales. Having official custody and control of the records of the company and having dis-

cussed their contents with the duly acting representatives of Dayton Murray Truck Sales and being familiar as a result of such information with the transaction, the witness Murray was perfectly competent to testify from the business records of Dayton Murray Truck Sales recording the transaction involved. In connection with Mr. Murray's testimony, foundation was laid as follows: "Question. Do you hold any office in Dayton Murray Truck Sales. Answer. I am presently the Secretary of that corporation. Question. In connection with your duties, do you have custody of the records and documents of Dayton Murray Truck Sales? Answer. I do. Question. Are you familiar at least in a general way with the transactions of the Dayton Murray Truck Sales? Answer. I believe I am, yes. Question. Are you familiar in particular with a transaction with the Eureka Lumber Company involving a sawmill? Answer. Yes, I am. Question. Do you have in your possession any records pertaining to that transaction? Answer. I have two documents that pertain to that transaction. I have a corporation copy of the invoice and a bill of sale. Question. These are a part of the regular business records of Dayton Murray Truck Sales? Answer. Yes, they are, they were in the file marked under the name of Eureka Lumber Company when I received the same (335 and 336). And on page 338: Question. Now you have testified that in your official capacity you have custody of the records and documents of the Dayton Murray Truck Sales. Answer. That's correct. Question. Mr. Murray, I hand you a Car Invoice

form, No. 205, bearing the heading Dayton Murray Truck Sales, bearing date of January 1, 1956. Did that document come from the regular records and books of the Dayton Murray Truck Sales? Answer. Yes, it did. Question. Was it prepared in the ordinary course of business? Answer. Yes, it was. Question. And were the—in the ordinary course of business, were those prepared at or about the time of the transaction they purport to reflect? Answer. Yes. Question. They form a part of the records of Dayton Murray Truck Sales that are in your custody, in your official custody with the Dayton Murray Truck Sales? Answer. Yes, that's correct."

Under those facts as foundation, testimony of Mr. Murray regarding what the records revealed and the introduction of the records themselves were fully justified under the Uniform Business Records Act. *Loper v. Morrison,* 23 C. 2d 600, at page 608; *Fox v. San Francisco Unified School District,* 111 C.A. 2d 885; *Richmond v. Frederick,* 106 C.A. 2d 541; *Patrick v. Tetzlaff,* 46 C.A. 243. The Court then did not err in allowing witness Murray to testify as to the transaction.

V.

Specification 7 objects to the admission of a copy of the invoice covering the truck sawmill transaction on the ground that it is not the best evidence. Judged even by the standards set forth in Appellant's Opening Brief, the document is clearly admissible. The original was sent to the buyer, Eureka Lumber Com-

pany and therefore was not in possession of Dayton Murray Truck Sales (341). The original was shown to exist inasmuch as it was received by appellee (99) and the original was lost or its whereabouts not known at the time of trial (99, 100). No further authority need be cited for the admissibility of this business record complained of.

VI.

In considering Specification 9 the complaint of appellant seems to address itself to the requirement that appellee *wilfully* failed to produce records or comply. And, secondly, that the defendant had the burden of proving such wilfulness.

In regard to the first matter, Section 533 of the Insurance Code of the State of California requires a wilful rather than a negligent act of the insured to exonerate the insurer. Appellant certainly does not deny the fact that substantial compliance with the provision to provide records or copies thereof would suffice for the performance of this condition subsequent. In other words a showing of the impossibility of producing lost or destroyed records would excuse such performance. Certainly counsel for appellant does not contend that he could make demand for all sales invoices of 1956 when $530,000 of sales were involved, and then upon failure to provide one of the said sales invoices, complain of a non-compliance. Such provisions as are here involved are properly in insurance policies for the protection of the insurer and require all *reasonable* compliance by the insured.

Reasonable compliance would mean the attendance upon all examinations under oath as requested. In this case, there is no contention that the insured, H. M. Jensen, the appellee, refused or failed to appear at any examination or that upon his appearance he refused or failed to answer any questions put to him, relevant or irrelevant. Nothing in the policy requires any agents or employees of the insured to appear for examination such as was requested by the insurance carrier. And wisely is such a provision omitted. Employers cannot always require employees to appear and testify and if it should develop that in the event of a fire such employees' appearance was requested by the insured and the employee refused to go and testify, the insured would thus be done out of his insurance through an agency over which he would have no control.

The only complaint as to the failure to comply with the requirement that the insured attend upon and answer questions at a sworn examination and that he produce all records and copies thereof relates itself to the latter requirement. There is a divergence of testimony on whether or not this was complied with. The testimony of the appellee states that the office was invaded by fire (109, Ex. 10), that smoke was seen billowing out of the office (113), that upon the initial formal demand for sworn examination and records he made himself and his records available; that prior to such formal demand he had made his records, such as they were, available to all insurance representatives and adjusters and never refused access to any records

(121 through 124); that he asked for supplier's invoices (136); that the biggest part of his records were rotted and wet (206); that he turned over all records he could find (207); and through counsel agreed to comply with any specific request (209, 210); that no specific lists were made available (569).

That testimony, standing alone, fully supports a finding that all records within the power of the insured to produce were produced on demand and on repeated occasions and that no refusal to make records available was ever given.

The appellant claims no refusal but seeks to establish a failure by introducing a letter of the shotgun type designed to encompass the entire field calling for production of copies of books known to have been destroyed, together with copies of all third party records, some of which were not available to the appellee. Whether or not there was a compliance with the duty to produce records was a question of fact for the jury and which was submitted to them for decision.

The instruction under which it was submitted placed on the defendant the duty to establish his defense in this connection. We have previously discussed the fact that the defense would depend upon a wilful noncompliance or intentional non-compliance. There is little doubt that this being a matter of affirmative defense which would have to be pleaded by the defendant to be available to them, the jury was properly instructed that it was the burden of the insurance company to prove such defense.

The policy itself provides that the duty to submit to sworn examination and produce records is a condition subsequent which does not arise until after loss has occurred and that it does not appear as a condition precedent to loss, nor to suit. The best evidence of this is the provision of the policy itself which provides: "That failure either to produce such documents or to submit to such examination under oath constitutes a complete *defense* to any action on the policy" (emphasis supplied). This being a matter of defense, it must be pleaded and proved by the defendant. 28 *Cal. Jur.* 2d on Insurance, §599, page 368. In proving this defense certainly the defendant-appellant would be required to show a wilful non-compliance as required in Section 533 of the Insurance Code, and would also be required to show that the non-compliance was substantial and material. This provision in the Standard Fire Insurance Form is not designed to be a trap for the unwary, but certainly contemplates only culpable refusal on the part of the insured.

The cases cited by appellant in this connection all seem to concern themselves with an outright refusal to submit to an examination under oath and a refusal to produce records known to be available to them and which they admit to be available to them. The case of *Rizzutto v. National Reserve Insurance Co.,* 92 C.A. 2d 143, is inapplicable here, inasmuch as it discusses a condition precedent as to which of course the insured would have the burden of proof. Here there is no doubt but that the loss occurred under the terms of the policy and within the risks covered. Any plea by

way of confession and avoidance or failure to perform a condition subsequent is a matter of defense to be proved by the insurer.

VII.

Specifications 10 and 11 both have to do with the refusal to give appellant's proffered instructions on fraud and concealment, and misrepresentation. These can be treated in one argument.

First of all, there is no evidence in the case relating to any concealment or alleged concealment, no showing of any fact coming to the attention of the appellee which he neglected to communicate to the insurer. There being no evidence on which to submit this issue to the jury, it was properly refused.

Regarding misrepresentation or fraud, the Court instructed the jury as follows on pages 588-589: "If the jury should find from the evidence that the plaintiff purposefully and deliberately padded or exaggerated his claim to a material extent in order to cheat or defraud the insurance company, the plaintiff cannot recover, but any difference between the amount claimed and the actual amount of the inventory if there be such a difference cannot be considered as the basis for debarring recovery if such differences are the result of honest evaluation or based upon conflicting or differing opinions as to the amount and value. The burden of proving any alleged wilful or fraudulent padding of his claim by the plaintiff rests upon the defendant." This adequately submitted to the jury the issue of fraud in the filing of the proof of loss in

the amount of loss claimed therein as compared to any actual loss or any misrepresentation to the carrier. It placed properly the burden of proof inasmuch as this is an affirmative defense and one which the appellant concedes he has the burden of proving (appellant's proposed instruction No. 24). *Helbing v. Svea Insurance Co.,* 54 C. 156; *West Coast Lumber Co. v. State Investment and Insurance Co.,* 98 Cal. 502; *Miller v. Fireman's Fund Insurance Co.,* 6 C.A. 395; *Hyland v. Millers National Insurance Co.,* 91 Fed. 2d 735; *Clark v. Phoenix Insurance Co.,* 36 C. 168.

As to the query of the jury during its deliberations as to the imputation of fraud to an employer, it has heretofore been observed that such inquiry was discussed by both counsel and Court in chambers and the Court after full discussion with counsel stated its intention not to comply with a request for instruction on that basis since it would be but the statement of an abstract principle of law. Counsel for appellant and appellee offered no better solution to the Court and the record is devoid of any exception noted to the failure so to instruct.

VIII.

Argument as to Specification 12 has been covered amply in the discussion of Specification 9 and nothing further need be added here.

IX.

Specification 13 warrants no discussion, having been fully covered in the discussion of the previous specifications.

CONCLUSION.

Appellee submits that the appellant has submitted no grounds requiring reversal of this judgment nor of the action of the trial Court. There is no circumstance shown sufficient to warrant any reasonable inference of arson and as a result of that fact, no reason to consider any evidence of motive or conspiracy in relation thereto. All such matters were properly excluded from the trial and from the consideration by the jury. The jury was properly and fully instructed on the real issues of the case both as to the degree of proof required, the points required to be proved and the respective burdens of proof.

Wherefore appellee respectfully urges the affirmance of the judgment.

Dated, Eureka, California,
May 23, 1958.

Respectfully submitted,
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